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No. 88-1046

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

RAYMOND J. TORRES, FRANKLIN J. UTZ, and GERALD F. SCHMIT,

Petitioners,

v.

WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, TAYCHEEDAH CORRECTIONAL INSTITUTION, NONA J. SWITALA, and CERTAIN UNNAMED DEFENDANT EMPLOYEES OF THE WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondents.

OBJECTION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this case is ripe for review by the supreme court where the court of appeals remanded the case to the

district court for the presentation of additional evidence and reconsideration by the district court in light of the totality of the evidence before it?

2. Whether a gender bona fide occupational qualification ("BFOQ") in a female prison can be based on the rehabilitation needs of the female inmates where rehabilitation is one of the primary purposes of the institution?

3. Whether in order to meet its burden of proof under Title VII with regard to a gender based BFOQ plan adopted for rehabilitation purposes, a prison administrator must be able to introduce validation studies or similar statistical evidence or whether the burden may be carried by expert testimony and other kinds of evidence?

4. Whether the district court is free to completely substitute its judg-

ment for that of a prison administrator in a Title VII case where the administrator's reasoned judgment is based on available information and experience or that judgment is entitled to be accorded some limited deference or, alternatively phrased, substantial weight?

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OPINIONS BELOW

Respondents rely upon the full text of the opinions from the lower courts which are set for the appendix to the initial petition.

JURISDICTION

Respondents accept the jurisdictional statement set forth in the initial petition.

STATUTES INVOLVED

Respondents rely upon the text of the statute set forth in the initial petition.

STATEMENT OF THE CASE

A. Facts and background.

The following facts are relevant to this objection. Citation is to the appendix of the initial petition (Initial Petition, A. __a) or to the trial record.

The Superintendent of TCI when the BFOQ plan at issue was approved by the Department of Health and Social Services was Nona Switala. Taycheedah Correctional Institute ("TCI") is Wisconsin's only maximum security prison

for women (Initial Petition A. 1a). At the time the BFOQ plan at issue was formulated a high percentage of the female inmates, approximately 60%, had histories of physical and sexual abuse by males (initial petition, A. 2a). Ms. Switala became the superintendent in 1978 (Tr. 9 at 4). Her professional experience before she was appointed superintendent was all in the corrections field. (Id.) She served as a probation and parole officer for eight years before assuming the responsibilities as the treatment director for TCI. (Id.) As treatment director for TCI, she had continual direct contact with the female inmates incarcerated in the prison (Tr. 9 at 11-22). Her job was to develop and manage the treatment programs that were necessary to satisfy Wisconsin's rehabilitation goals. (Id.) After three

years as TCI's treatment director, Switala assumed administrative duties with regards to all aspects of Wisconsin's penal policy as the newly appointed superintendent (Tr. 9 at 21, 22).

When the DHSS requested institution submissions for BFOQ plans, Switala, working with acting superintendent Robert Rafferty submitted a plan that requested authorization for a female sex BFOQ for at least one officer assigned to each living unit (Tr. 9 at 33-39). The duties of the officer in charge of a living unit included random and routine observation of all areas inhabited by inmates, whether occupied or unoccupied (Tr. 9

at 150, Exs. 350-59).[1] The perimeters of a living unit varied with the security level of the house function from a floor to an entire house (Tr. 9 at 33-152). This BFOQ was implemented to ensure that all of the most intrusive security procedures would be consistently and efficiently performed without unduly diminishing the female inmates' sense of dignity and integrity (Tr. 9 at 41-45). The female inmates would know that while in the intimate setting of their bedrooms and bathrooms and hallways of housing units a female officer with responsibility for observing them, wherever they

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[1]The trial testimony of the petitioners and their witnesses established that the petitioners disregarded their duty to observe in favor of preserving the inmates' privacy. Since the petitioners were housing unit sergeants, they were the highest ranking officers in the house and were the lead workers in authority over lower ranking officers (Tr. 9 at 50).

were, was always on duty and, therefore, security was not lax, and that while male officers could hold posts in the housing units,[2] they were not subjected to the exclusive power of a male in this personal intimate setting. (Id.) The BFOQ was meant to enhance both the actual security and the inmates' perception of security. (Id.) Switala's experience as the treatment director convinced her that it was reasonably necessary for an inmate to feel secure in order for the inmate to respond to the institution's treatment programs. (Id.)

Switala did not seek to create an unnatural environment, i.e., a prison from which men in authority were excluded

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[2]A male CO could be a "rover," an officer who moved through the house and on the ground, but who did not have the same duties in the house as the floor officer or Sergeant.

(Id., Tr. 10 at 5, 6). She did seek to create a residential environment in which the dual goals of security and rehabilitation were promoted through a limited BFOQ. (Id.)

Experts with substantial correctional experience testified that the BFOQ was reasonably necessary to promote the rehabilitation goals of this institution. In addition to superintendent Switala, the respondents presented testimony from Ms. Jacqueline Fleming, the current warden of Shakopee Correctional Institute, a female prison

in Minnesota[3] (Tr. 11 at 74-88). Ms. Fleming's testimony, based on her professional experience in the mental health field, her extensive experience as a correctional administrator and her substantial familiarity with TCI, was that the type of BFOQ at issue was necessary to promote rehabilitation in an institution where a large percent of the women inmates experienced physical and

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3The TCI BFOQ was not a blanket BFOQ that could inhibit the petitioners' movement up the ranks. The majority of the higher ranking officers at TCI were and continued to be male. Promotional opportunities existed for the petitioners. Between their demotion and the trial, each of the three petitioners had been offered three opportunities to regain their former rank as sergeant, two at TCI and a third at a nearby institution. The petitioners declined these opportunities and retained the CO II rank. (Torres, Vol. 1 at 206,211; Schmit, Vol. 2 at 100, 104,105; Utz, Vol 2 at 230, 234-35, 237). Further, throughout Wisconsin's correctional institutions, males held approximately 96% of the sergeant positions (Ex. 83).

sexual abuse (Tr. 11 at 82-86). Ms. JoAnne Brown, a lawyer and correctional consultant as well as the former superintendent of both male and female prisons in New Mexico also offered expert testimony in support of the BFOQ (Tr. J. Browne at 3-13, 30-34, 53, 54). In addition Ms. Brown testified to the different correctional concerns that occurred when an administrator was charged with rehabilitation responsibilities when the majority of the prison population had been abused or exploited by members of the opposite sex (Tr. J. Browne at 35, 45). In addition, Dr. Henry Musk, a psychologist who, for 10 years treated women prisoners with similarly abusive background testified as to the reasonable necessity of the BFOQ in light of the fundamental treatment needs of women who were victims of abuse

(Tr. at 29-48). The recidivism rates had not changed in the short time since the BFOQ plan was effective and the respondents did not offer any empirical proof, such as, validation studies.

The petitioners offered testimony from Dr. Frederick Fosdal, a psychiatrist who had never held either a treatment or administrative position in any prison, much less a female prison, who opined that while it was desirable to replicate normal situations by having males in the prison, it was not normative in our society for unrelated males to watch women sleep and that the atmosphere in the living unit would be improved, from the women inmate's perspective, if women correctional officers handled the routine monitoring in the living units (Tr. 6 at 14, 15, 31-33, Ex. 466). The petitioners also offered testimony from

Dr. Kalinich, a professor who was similarly lacking any professional employment in a women's prison and who had just recently taken an interest in women prisoners, who testified that the current "vogue" was to give up on rehabilitation (Tr. 6 at 140-43, 155). Kalinich also testified that there has been no research on the issue of the use of male guards in female prisons and very little on the subject of female correctional institutions in general (Tr. 6 at 138-43).

1. District court decision and order.

The district court decision found that approximately 60% of the inmates at Taycheedah Correctional Institution had been sexually or physically abused (Initial Petition, A. 88a). The court held that the expert testimony given by

the prison's administrator and that given by other penalogical experts that the BFOQ was reasonably necessary to the rehabilitation of these inmate could not validate the plan. The court did not evaluate or otherwise consider this evidence except to note that petitioners presented conflicting evidence. (Id.) The court refused to find the plan valid in the absence of objective evidence from "empirical studies or otherwise displaying the validity of the theory" (Initial Petition, 89A).

2. Court of appeals panel decision.

Respondents have nothing to add to petitioners statement of this decision.

3. Court of appeals on en banc decision.

The en banc opinion reversed the district court opinion with regard to nature of the proof necessary to establish the validity of the BFOQ plan. The court held that respondents were not required to introduce validation studies or similar empirical evidence in order to meet their burden of proof (Initial Petition, 21A). The en banc opinion allows that respondents could prove a reasonable necessity through expert testimony and evidence other than validation studies or statistics. (Id.) The en banc opinion held that standard imposed by Judge Warren was unfair because it was, essentially, impossible--the record established that the scholarly work on the rehabilitation of female offenders has yet to be commenced. The court also observed that

the district court ought not require unanimity of opinion or substitute completely its own judgment for that of the administration in its reconsideration of the case.

The court did not establish any bright line rule governing the nature of the proof required to meet the reasonable necessity standard of Title VII with regard to a gender BFOQ. Rather, it remanded the case for further proceedings, including the presentation of additional evidence, with a direction that the court give the issue further consideration based "on the totality of the circumstances as contained in the entire record" (Initial Petition, A. 21a). The court declared that the decisions of penal administrators are not to be given the same degree of deference in Title VII cases as they are given in

constitutional cases, but nonetheless they are entitled to substantial weight when they are the product of reasoned decision making based on available information and experience. Additionally, the court held that the employment situation in which an employer could argue that gender based distinctions were a "reasonably necessary" approach to innovation in one's business were "rare" indeed (Initial Petition, A. 22a, A. 23a).

REASONS FOR DENYING THE WRIT

I. THE CASE IS NOT RIPE FOR REVIEW.

The questions presented section of the petition and, in general, the entire brief creates the impression that the merits of the BFOQ issue were decided by the court of appeals and that the petitioners are appealing from a final

judgment. This is an erroneous impression. The court of appeals did reverse the district court, but only on the narrow issue of the nature of proof capable of sustaining a BFOQ plan in a Title VII case.[4] Respondents submit that the writ should be denied until a final judgment is entered.

Certiorari jurisdiction is "to be exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U.S. 251, 258 (1916). The usual reasons for not granting the writ at this time apply. First, given the factual bound nature of any final decision, the trial record should be as complete as possible before this court expends judicial

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[4]The final section of petitioners' brief recognizes this fact.

resources on a review of the case or of the evidentiary standards governing the case. See, Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 279 (1988), Justice Stevens concurring. In addition, the petitioners may prevail in the district court, eliminating any interest on their part and review by the supreme court. Whether or not the petitioners prevail on the merits of this issue, by denying the writ at this time, the supreme court would ensure that it had the benefit of a lower court opinion addressing the totality of the evidence in the record and evaluating and weighing that evidence instead of decisions that disagree on the narrow issue of whether a gender BFOQ can ever be justified without validation studies or similar statistical evidence.

II. THE WRIT SHOULD BE DENIED BECAUSE THE EN BANC DECISION IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND THOSE OF THE CIRCUITS.

The petitioners' assertion that the en banc decision is in conflict with Dothard v. Rawlinson, 97 S. Ct. 2720 (1977), Western Air Lines v. Criswell, 105 S. Ct. 2743 (1985) and other supreme court cases is the direct result of its overbroad characterization of the decision and its failure to read these decisions closely. Petitioners' claim that the decision opens "a pandora's box" regarding deference which has no logical stopping point is similarly erroneous (Initial Petition, at 15-16). A comparison of the actual language of the decision with that of the relevant cases will quickly establish how exaggerated and inappropriately alarmist the petitioners' "pandora's box" cry is.

The en banc decision did not recognize any general principle of broad deference to employer's judgment, even when the employer is a prison administrator who would be afforded such deference in constitutional cases.[5] What the court in fact did was duplicate the analysis employed by the supreme court in Dothard. In "conformity with the mandate of the supreme court in Dothard," the court first identified the particular and unique environment that was under consideration which it found to be maximum security womens prison in which the respondents were engaged in carrying out the legislatively mandated "business" of rehabilitating the women prisoners

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[5]The decision states flatly: "In the Title VII context, the decision of penal administrators need not be given as much deference as accorded their decisions in constitutional cases" (Initial Petition, A. 21A).

(Initial Petition, A. 14a, 15a). Like the Dothard court, the en banc decision then focused on the key characteristic of the inmate population. In Dothard that was the 20% sex offender group; in this case, the 60% sexually and physically abused group were the central concern.

The court then answered the question of whether or not Dothard required that penal administrators' have objective evidence, in the form of validation studies or empirical proof, to justify a BFOQ. The court found that not only had such studies not been required in Dothard, but that moreover, the supreme court's finding that "there is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison" and that there would be a

real "risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women" were a product of a common sense understanding of penalogical conditions and, implicitly, a limited degree of judicial deference to prison administrator's judgment (Initial Petition, A. 19a). It applied similar reasoning to the case before it. The en banc decision does not conflict with Dothard; to the contrary it follows in its footsteps.

The en banc ruling that empirical studies are not always necessary to validate a BFOQ and that deference may play a limited role in certain special circumstances is similarly supported by the Criswell decision. In Criswell, the supreme court recognized the fallacy of requiring empirical studies when it held

that the airline need not establish the risk of an airline accident to a certainty "for certainty would require running the risk until a tragic accident would prove the judgment was sound." Further, the court considered it permissible for the fact finder to defer to the airline's judgment in close cases. Criswell, 105 S. Ct. at 2754 (Initial Petition, A. 19a, n.3).[6]

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[6]The en banc decision appropriately incorporates those precepts that the supreme court has found to be relevant to the review of penal administrators judgments, i.e., recognition of the complex and intractable problems faced by prison administrators and the need to "anticipate" and "innovate," Turner v. Safley, 107 S. Ct. 2254 (1987), O'Lone v. Estate of Shabazz, 107 S. Ct. 2400 (1987) in its determination that a prison administrator can validate a BFOQ without empirical studies or the like. However, the opinion does not hold that these principles require broad deference to penal administrators. Rather, the court finds that these features make it unfair and unreasonable to require the kind of objective proof that might fairly be demanded in other cases.

While the district court is directed to accord the judgment of the penal administrator's substantial weight, it need do so only to the extent that the judgment constitutes a reasoned belief based on available information and evidence. This formulation, quite like the ordinary instruction on expert testimony, derives more from common sense than from any federal deference policy. It does not permit stereotyping (a prejudice without a reasoned basis in fact or experience). The en banc decision follows the law established in Dothard and other Title VII cases.

III. THE EN BANC DECISION DOES NOT PERMIT SEX DISCRIMINATION WITHOUT AN ADEQUATE BASIS.

The third section of the petitioners' argument again sounds the

floodgate alarm.[7] Petitioners argue that unless objective, empirical or statistical evidence is required, employers will be able to discriminate on the basis of sex with impunity. The petitioners' reliance on Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988) for this proposition is mystifying. In Watson the court held that, once plaintiff had established a prima facie case of discrimination, the bank could successfully establish "business necessity" on the basis of subjective judgments without validation studies or similar statistical evidence. The court explicitly recognized that validation studies or

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[7]Respondents are not responding independently to petitioners second argument as it is repetitive of petitioners first argument.

standardized testing is not always practicable, as for example, when identification of personal qualities such as common sense, good judgment, originality or ambition were the objective. Watson, 108 S. Ct. 2777, 2780, 2787, 2791 (1988).[8]

The en banc decision is consistent with Watson and the decision in Chambers v. Omaha Girls Club Inc., 834 F.2d 697 (8th Cir. 1987), in which the eighth circuit held that the employer established a valid role BFOQ without the

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[8]The en banc decision recognized that "rehabilitation" encompassed concepts more refined than the gross measure of recidivism.

benefit of objective statistical evidence.[9]

The respondents have not been relieved of their heavy burden in this case. They simply have been relieved of the impossible burden imposed by the district court. They must still persuade the district court, a court which is charged with reviewing the totality of the evidence that the BFOQ plan at issue is valid.

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[9]The principle unifying these cases is a healthy dose of realism. These courts have refused to impress upon the an employer the impossible or highly impracticable burden of introducing evidence that either does not exist or cannot be reliably produced because of testing difficulties. See also, Criswell, 105 S. Ct. at 2748.

IV. REHABILITATION CAN SERVE AS THE BASIS FOR A BFOQ.

Title VII permits employers to establish those bona fide occupational qualifications reasonably necessary to the normal operations of the business or enterprise. Federal courts do not have any general authority to determine that the State of Wisconsin may not engage in the business of rehabilitation. Well established principles of commodity oppose such action. Turner v. Safley, 107 S. Ct. 2254 (1987).

The warden of Taycheedah Correctional Institution has a legislatively mandated responsibility to rehabilitate the women incarcerated in Taycheedah (Initial Petition, Appendix A. 15a). No less authority than the supreme court has observed that penal administrators must deal with "perplexing sociological

problems in order to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful law abiding citizens." Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (Initial Petition, Appendix 14A).

The State of Wisconsin has made a public policy decision that it will engage in the business of rehabilitation. That being so, it may establish a valid BFOQ under Title VII when such is reasonably necessary to the normal operations of that enterprise.

CONCLUSION

For all the reasons stated above the court should deny the writ.

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